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No. 564

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

CARMEN TISONE,

Appellant,

vs.

THE STATE OF OHIO,

Appellee.

REPLY TO MOTION TO DISMISS APPEAL FROM THE SUPREME COURT OF OHIO

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REPLY TO MOTION TO DISMISS APPEAL FROM THE SUPREME COURT OF OHIO

The appellant appeals from the judgment of the Supreme Court of the State of Ohio denying an application for rehearing of the Court of Appeals of Ohio, Seventh Judicial District, upholding the conviction of the appellant, and submits this Reply to Appellee's Motion to Dismiss the Appeal in order to further demonstrate to the Supreme Court of the United States that substantial questions of process and procedure are presented by this appeal, and to show that the grounds for dismissal cited by the Appellee are not well taken and should not be accepted by this Court.

QUESTION PRESENTED

Broadly, the question presented by this appeal is whether the court which originally tried the Appellant violated the Appellant's Constitutional rights guaranteed by the IV

and XIV Amendments to the Constitution of the United States by failing to sustain the Appellant's Motion to Suppress Evidence which had been obtained through the use of an alleged warrant for search.

In addition to this general question, the Appellant is asking the Court to consider several novel and substantial questions, which, if answered, will do much to illustrate the demands of the "due process" and "probable cause" prohibitions of the Constitution of the United States.

First, the Court is being asked to decide a fundamental question regarding the technical definition of the probable cause which will justify the issuance of a warrant. Article I, Section 14 of the Constitution of the State of Ohio and IV of the Amendments to the Constitution of the United States require that "probable cause" be shown before a warrant will issue. *Ex Parte Burford*, 3 Cranch 448, 453; *Rice v. Ames*, 180 U.S. 371, 374; *Byars v. United States*, 273 U.S. 28; *United States v. Hess*, 124 U.S. 483; and *Go-Bart Importing Co., et al., v. United States* 282 U.S. 344, 355, stand for the proposition that the issuance of a warrant must recite *facts* which are sufficient to demonstrate that an offense has been committed or that evidence of an offense may be found in the location set forth in the warrant. Ohio Revised Code, Section 2933.23; *Nicholas v. City of Cleveland*, 125 O.S. 474 (See Syllabus paragraph 4.); and *City of Akron, v. Williams*, 175 O.S. 186 (See Syllabus paragraph 1), demand that the officer to whom a warrant is issued recite *facts* which are likewise, sufficient to show that the affiant's belief correct. In the instant case, the officer to whom the warrant was issued stated only one *fact*—that he had kept the suspect premises under surveillance for two afternoons. He then went on to recite his *suspicion* that illegal activities were being perpetrated there.

The Appellee makes the somewhat novel contention that the facts known to the officer but which were not transcribed upon the affidavit were "incorporated in the affidavit and made a part of both instruments." See Appellee's Motion to Dismiss, pp. 4-5. Therefore, the Court is being asked to decide whether facts which, 1) were allegedly known to the officer, 2) may or may not have been recited to the judge issuing the warrant, and 3) were definitely not transcribed upon the affidavit are acceptable, according to Constitutional standards, for demonstration of "probable cause." It is Appellant's contention that these secondary "facts" claimed as justification by the Appellee are the same as the "after-the-event justification" so "likely to be subtly influenced by the familiar shortcomings of hindsight judgment" which was found insufficient to establish probable cause in *Beck v. State of Ohio*, November 23, 1964, reported originally in 33 LW 4015, 4017.

In the only opinion written in this case by the Ohio Courts it was stated that:

> "In determining what constitutes an unreasonable search and seizure in violation of the Fourth and Fourteenth Amendments of the United States Constitution, the significance of the *Mapp* case must be confined strictly to the aggravated facts of that case." *State of Ohio v. Carmen Tisone*, Appendix B.

The Appellant contends that the Court of Appeals failed to realize the import of this Court's decision in *Mapp*. *Mapp v. Ohio*, 367 U.S. 643. To strictly confine the significance of a case which demands that the states uphold the exclusionary rule when "probable cause" has not been shown, therefore subverting the due process demand of the Fourteenth Amendment, to cases where the excesses of the police are physically brutal and the procedural violations most flagrant, is a denial of due process to the citizen whose rights are denied not so blatantly as were

those of Miss Mapp. The Ohio Court of Appeals goes on to say that:

> "*Mapp* specifically states that it is for the trial court in the first instance to determine what constitutes a reasonable search and seizure and that in so doing, the trial court may not follow any fixed formula." Appendix B.

Although *Mapp* does *not* make this contention, a slightly similar statement may be found in *Ker v. California*, 374 U.S. 23, 34. However, *Ker* does hold that evidence which is seized in avoidance of the proscription of illegal searches and seizures must be excluded at the trial.

Second, this Court is being asked to decide whether or not it is necessary that an exact statement of the time of observation of the allegedly criminal activity is necessary to make a warrant comply the safeguards provided by the Fourth Amendment.

Warrants for search and arrest are extraordinary writs of court, since their result will be an invasion of privacy under the authority of the court. It is Appellant's contention that extraordinary powers should be hedged about with at least ordinary precautions, one of which certainly is that police officers be precluded from obtaining search warrants on the basis of information which may have been made stale by the passage of time.

Third, the Appellee assumes that the affidavit supporting the search warrant was filed with the judge as required by Ohio Revised Code Section 2933.23. This assumption is totally incorrect. The testimony of Officer Kovac who obtained the search warrant and executed the warrant demonstrates conclusively that the executing officer had both the warrant *and the affidavit* in his possession from the time of signing before the judge until after the execution of the warrant.

* * * * * * * * * * *

"23 Q. And from 10:00 o'clock until 2:30 in the afternoon you had those, affidavit and search warrant, in your presence? 25 A. Yes, sir. (Transcript, page 12)

* * * * * * * * * * *

7 Q. Did you keep them with you after you served Mr. Tisone? 9 A. I think I brought them back the next morning.

10 Q. Overnight they were in your possession? 11 A. Yes, sir.

12 Q. Both the affidavit and search warrant? 13 A. Yes, sir. (Transcript, page 13)

Obviously, the judge who issued the warrant could rely only on his memory to protect the affidavit and warrant from any changes the executing officer may have wished to make in the matter set forth in those papers.

It has been Appellant's contention throughout that there is no magic in the mere issuance of a warrant. The permission to invade privacy must be based upon fact and must be safeguarded by reasonable steps to insure that if is executed within the extraordinary limits for which it is granted. The courts of Ohio seem loath to provide even the protection demanded by the statutes of the State of Ohio. The questions set forth here are not only substantial and of great public importance, but the rights guaranteed by the laws of the United States and the State of Ohio have been violated in the case of the Appellant.

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APPENDIX A

Ohio Revised Code Section 2933.23

"A warrant for search shall not be issued until there is filed with the judge or magistrate an affidavit particularly describing the house or place to be searched, the person to be seized, the things to be searched for and seized, and alleging substantially the offense in relation thereto, and that the complainant believes and has good cause to believe that such things are there concealed, and he shall state the facts upon which such belief is based. The judge or magistrate may demand other and further evidence before issuing the warrant. If the judge or magistrate is satisfied that grounds for the issuance of a warrant exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched."

APPENDIX B

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS, SEVENTH DISTRICT

STATE OF OHIO,

Plaintiff-Appellee,

vs.

CARMEN TISONE,

Defendant-Appellant.

OPINION

Case No. 4324

APPEARANCES

Clyde W. Osborne, Prosecuting Attorney, and Loren E. Van Brocklin, Assistant Prosecuting Attorney, Youngstown, Ohio, for Plaintiff-Appellee.

Avetis G. Darvanan, Youngstown, Ohio, for Defendant-Appellant.

Hon. Paul W. Brown, Hon. James G. France, Hon. George M. Jones, JJ.

Dated: October 22, 1963.

Grace Marten, Court of Appeals Reporter, Mahoning County Courthouse, Youngstown, Ohio.

BROWN, P. J.

Defendant was found guilty by a jury and sentenced by the court for violating Revised Code Section 2915.13 (promoting a numbers game). Counsel for defendant maintains the court below must be reversed.

Defendant claims in his first assignment of error that Revised Code Section 2915.13 is unconstitutional in that it attempts to give the State of Ohio extra territorial police powers.

We hold that Revised Code Section 2915.13 does not violate any provision either of the Constitution of the State of Ohio or of the Constitution of the United States and that this assigned error is not well taken.

Defendant claims Revised Code Section 2915.13 is "unconstitutional because it is not definite and certain as to its meaning."

The act to which reference is here made is not uncertain in meaning. In fact, the words of the statute of which counsel for the defendant complains appear to have been inserted for the purpose of permitting particular words of local usage helpful in defining the exact "scheme of chance" to be inserted. The words or terms of similar import to "numbers game", "clearing house", or "policy" need only be such as will convey to a person of ordinary understanding and intelligence an adequate description of the prohibited act. Wharton Criminal Law and Procedure (1957), Volume 1, Page 32, Section 18.

Defendant complains that the court erred in overruling appellant's motion to suppress evidence claimed to have been obtained by unlawful search and seizure. Defendant cites *Mapp v. Ohio*, 367 U. S. 643.

This case is authority for the point that admission in state court of evidence obtained by illegal search and seizure is a violation of the due process clause of the Fourteenth Amendment to the Federal Constitution. *Mapp v. Ohio* overruled *Wolf v. Colorado*, 338 U. S. 25, which had held that the so-called exclusionary rule applied to federal courts only.

In determining what constitutes an unreasonable search and seizure in violation of the Fourth and Fourteenth Amendments of the United States Constitution, the significance of the *Mapp* case must be confined strictly to the aggravated facts of that case.

Mapp specifically states that it is for the trial court in the first instance to determine what constitutes a reasonable search and seizure and that in so doing the trial court may not follow any fixed formula. See also *State v. Young*, 91 Ohio Law Abstract 21.

In this case a warrant was issued upon an affidavit regular in form which contained the allegations required by Revised Code Section 2933.23. The facts stated therein or elicited by the court before issuing the warrant were such as to justify the trial court in issuing a search warrant.

The affidavit filed with the court for the purpose of obtaining the warrant stated the place to be searched and the property to be seized. It recited the belief that gambling paraphernalia, to-wit, numbers slips and horse bet slips were in the possession of the defendant, Carmen Tisone, and that the belief was based upon the fact that said premises were kept under surveillance by affiant, a police officer, and was based upon his observation during that period of time. Among these facts were statements from which it could be gathered that the numbers of people who were frequenting the described premises during the period of observation, and the manner of their frequenting said establishment, was the basis of the belief of the affiant that there was probable cause for a warrant to issue.

In *State of Ohio v. Mapp*, 170 Ohio St. 427, the Supreme Court of Ohio assumed that the search and seizure was unlawful, so that court was not reversed by the United States Supreme Court upon this finding.

No federal case cited holds that state courts are required to follow rules or statutes followed by the federal courts in determining what is a reasonable and hence lawful search and seizure or the federal mechanics before obtaining a state court search warrant. If it were so held we would be extremely interested in the rationale.

The search in this case was reasonable and in all respects lawful, no right of privacy was unlawfully invaded. Due process was carefully observed. The police officers involved should be commended for diligence. The motion to suppress was properly overruled.

The fourth assigned error involves the trial court's refusal to instruct that mere possession of numbers slips by the defendant would not be a crime under Revised Code Section 2915.13. Under the evidence in the case such a charge was properly refused.

The record does not bear out the errors assigned as fifth and sixth, and they are overruled.

FRANCE, J., Concurs.

JONES, J., Concurs.

APPROVED:

PAUL W. BROWN,

Judge.